



April 3, 2002

Ms. Beth Vidaurri
Officer for Public Information
Corpus Christi Regional Transportation Authority
5658 Bear Lane
Corpus Christi, Texas 78405

OR2002-1620

Dear Ms. Vidaurri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160907.

The Corpus Christi Regional Transportation Authority (the "authority") received a request for copies of the last invitation for bids for the Water Taxi and the bids received in response to that invitation. You indicate that you have provided the requestor with a copy of the request for proposal for the Water Taxi, as well as copies of portions of one bid submitted in response to the request for proposal. You claim, however, that the remaining submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, and 552.104 of the Government Code. You also claim that the release of this information may implicate the proprietary interests of a particular third party under section 552.110 of the Government Code. Pursuant to section 552.305(d) of the Government Code, the authority notified the interested third party, Barney's Place, Inc. ("Barney's"), of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances).* We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted to us by the requestor. *See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).*

We note at the outset that the authority failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides that a governmental body that requests an attorney general decision concerning a request for information must, within a reasonable time but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld and a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date. *See* Gov't Code § 552.301(e)(1)(A), (C). The authority failed to provide us with this particular information within fifteen business days of receiving the request for information.

When a governmental body fails to comply with the procedural requirements of section 552.301 of the Government Code, the information at issue is presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must demonstrate a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is a demonstration that some other source of law makes the requested information confidential or that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).

Although the authority claims that portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code, we note that section 552.104 is a discretionary exception under the Act that does not constitute a compelling reason sufficient to overcome the presumption that the requested information is public.¹ *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Accordingly, we do not address the authority's section 552.104 claim with respect to any portion of the information. However, since the authority also claims that portions of the information are excepted from disclosure under sections 552.101, 552.102, and 552.110 of the Government Code, we address those claims.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Barney's has not submitted any comments to this office explaining why any portion of the information should not be released

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

to the requestor. Therefore, we have no basis to conclude that the release of any portion of the information would implicate Barney's proprietary interests under section 552.110. *See* Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the authority may not withhold any portion of the information from disclosure pursuant to section 552.110 of the Government Code.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, section 552.102 only protects information in a personnel file of a governmental body, not a private third party. The personnel information submitted to us for review concerns employees of a private third party. Accordingly, the authority may not withhold any portion of the information from disclosure pursuant to section 552.102 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). We note that the authority has not asserted any law, and this office is not aware of any law, that makes any of the information confidential under section 552.101. Accordingly, the authority may not withhold any portion of the information pursuant to section 552.101 of the Government Code.

However, we note that the information contains e-mail addresses that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public in question have affirmatively consented to their release, the authority must withhold from disclosure the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code. The authority must release the remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

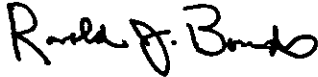
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald J. Bounds". The signature is fluid and cursive, with the first name "Ronald" being more prominent.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 160907

Enc. Marked documents

cc: Mr. L. H. Dunlap
1104 South Whitney # 6G
Aransas Pass, Texas 78336
(w/o enclosures)

Barney's Place, Inc.
420 Bigelow Street
Aransas Pass, Texas 78336
(w/o enclosures)